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In the Supreme Court of the United States

OCTOBER TERM, 1956

COMPANIA ITHACA DE VAPORES, S. A., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	6
Conclusion	9

CITATIONS

Cases:

Adams v. *United States*, 101 F. Supp. 956, affirmed, 201 F. 2d 150	6, 7
Al's Lunch v. *City of Revere*, 324 Mass. 472, 87 N.E. 2d 5	8
Dunham v. *Boston*, 12 Allen 375	8
Lilly v. *Haynes Co-op. Coal Mining Co.*, 50 N.D. 465, 196 N.W. 556	6
Matson Navigation Co. v. *United States*, 284 U.S. 352	9
Mayor of Jersey City v. *Town of Harrison*, 72 N.J.L. 185, 62 A 765	8
Polar Compania de Navegacion v. *United States*, 124 F. Supp. 625	3
United States v. *Adams*, 201 F. 2d 150	9

Statutes:

Suits in Admiralty Act, 46 U.S.C. 741-752	3, 9

Miscellaneous:

1 Corbin, Contracts (1950):	
§ 11, p. 23	8
§ 30, p. 80	7
§ 61, p. 186	6, 7
§ 67, p. 211	8

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OPINIONS BELOW

The opinion of the Court of Claims dismissing the petition in that court (Pet. 13-23) is reported at 149 F. Supp. 257. The opinion of the Court of Claims denying the motion of the United States for summary judgment (Pet. 9-11) is reported at 124 F. Supp. 627.

JURISDICTION

The decision of the Court of Claims dismissing the petition in that court was entered on March 6, 1957 (Pet. 13). The petition for a writ of certiorari was filed June 3, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether a vote by the Maritime Commission, approving a proposed settlement of petitioner's claim for damage to its ships "subject to clearance by the General Counsel," constituted an acceptance of the proposal upon which petitioner could maintain suit in the Court of Claims, although the action of the Commission was never officially communicated to petitioner and although the proposed agreement was not cleared by the General Counsel and rejected upon reconsideration by the Commission.

STATEMENT

Petitioner, a Panamanian corporation, had time-chartered its vessel (the SS. *Moldova*) to the United States, through the War Shipping Administration, under a WARSHIPTIME (Forflag) Charter commencing in April, 1942 (Pet. 17-18). Prior to redelivery to plaintiff on February 28, 1946, the *Moldova* was surveyed and, while a number of items of damages to the vessel resulting from the charter were agreed upon and settled between the parties, no agreement could be reached with respect to petitioner's claim of $60,400.91 for damage resulting from the carriage of bauxite (Pet. 18). Petitioner, on September 12, 1950, brought suit for this amount in the Court of Claims, basing its claim upon the Government's alleged failure to redeliver the ship in "good order and condition" as required by the terms of the charter (Pet. 9). On July 1, 1954, petitioner amended its petition to allege that the Maritime Commission had approved a compromise of this claim in the amount of $19,270, but that, after expiration of the time within which petitioner could

have commenced suit under the Suits in Admiralty Act (46 U.S.C. 741-752) against the United States on the original claim, the Commission withdrew its administrative approval of the settlement (Pet. 9-10).[1] The Government moved for summary judgment, urging that the claim was exclusively cognizable in admiralty. This motion was denied on October 5, 1954 (Pet. 9-14). The court below recognized that the claim asserted in the original petition was a maritime cause of action of which the district courts have exclusive jurisdiction, citing *Polar Compania de Navegacion v. United States*, 124 F. Supp. 625 (C. Cls.). Nevertheless, it held that it would sustain its own jurisdiction if petitioner were able to establish a binding agreement for the settlement of the maritime claim (Pet. 11).

Hearings were held before a Commissioner, and the case then argued before the court which on March 6, 1957, held that petitioner had failed to establish a binding settlement agreement and, accordingly, dismissed the petition. As established by the court's findings (Pet. 17-23), it appears that after prolonged negotiations for the settlement of petitioner's claim, the Chief, Bureau of Operations, presented to the Maritime Commission a memorandum dated September 15, 1947, stating that the parties had agreed to a settlement of 50% of the actual bauxite damage, or $19,270, and recommending that the Commission authorize the chief of the appropriate office to enter into settlement

[1] On August 3, 1951, petitioner had filed suit in the United States District Court for the Southern District of New York, praying for judgment in the same amount as in its original petition in the Court of Claims and making the same allegations. That suit was dismissed for failure to comply with the two-year statute of limitations of the Suits in Admiralty Act (Pet. 23).

agreements with petitioner. The Commission discussed the memorandum and then referred it to the General Counsel for review and report (Pet. 20). At his suggestion, the memorandum was revised and, on December 8, 1947, was again submitted to the Commission (Pet. 20). The minutes of the Commission for that date set out this memorandum and then contain the following recitation, upon which petitioner relies as the basis of his claim (Pet. 21):

> After discussion, by the unanimous "yea" vote of the members of the Commission present, the recommendations contained in the foregoing memorandum were approved *subject to clearance by the General Counsel*, and the proper officers of the Commission were authorized and directed to take any and all actions necessary and proper to carry the action of the Commission as above set forth fully into effect. [Emphasis added.]

No official notification of this action was ever given to petitioner. The Court of Claims found (Pet. 21) that petitioner's counsel "was advised by an unidentified person in the office of the Secretary of the Commission of the action taken by the Commission on December 8, 1947, when he visited the office on that date to inquire."[2]

The day following the Commission's meeting, the Secretary of the Commission forwarded the memoran-

[2] Petitioner's then attorney testified at the hearing before the Commissioner that he received this information from one of the "four girls sitting outside the office * * *" of the Secretary of the Commission; that at the attorney's request, this girl examined the Commission's docket book, asked the attorney the name of the vessel, and told him that his offer had been approved (T. 81-82).

dum to the General Counsel, advising him that the Commission had approved it, "subject to clearance by you," and requesting him to furnish his clearance as soon as possible (Pet. 21). The memorandum, however, was never cleared by the General Counsel; instead, at the request of Commissioner Raymond S. McKeough, who was not present at the Commission's meeting of December 8, 1947, the memorandum was resubmitted to the Commission and, after being discussed and "laid over" without action during several Commission meetings (Pet. 21), it was again presented to the Commission on March 5, 1948, accompanied by a memorandum from the General Counsel recommending that petitioner's claim be disallowed (Pet. 22). After discussion, this recommendation was accepted, and the proposed settlement disapproved (Pet. 22).

Upon petitioner's subsequent attempt to obtain payment of its claim, its voucher was returned, together with a letter from the Secretary of the Commission advising petitioner that the Commission had directed that denial of its claim would not be reconsidered (Pet. 22).

On these facts, the court held, contrary to petitioner's contention, that the Commission had at no time taken final action approving the settlement, and had never promised to pay the proposed amount (Pet. 15-16). The court held that the Commission's approval was qualified by the phrase "subject to clearance by the General Counsel," and that even if, as petitioner claimed, this phrase meant only, subject to his putting the agreement into formal legal terminology, that still there was no promise to pay until this had been done, and until the General Counsel "had prepared the necessary documents setting forth the agreement and a

promise to pay, in consideration of the release by plaintiff of its claim against the defendant, or whatever else counsel may have thought necessary and proper to include in the documents. As we have seen, this was never done." (Pet. 16). Accordingly, the court held that petitioner had no new promise on which it could sue, and that since any right of action on the original charter agreement was beyond the court's jurisdiction, the petition must be dismissed (Pet. 16-17).

ARGUMENT

This case presents no issue appropriate for this Court's consideration. No conflict of decisions is involved and no important issue of law. The decision of the Court of Claims dismissing the petition rests upon the application of settled principles of contract law to the particular facts of this case; it is correct, and requires no further review.

There is no substance to petitioner's contention that the Commission's action embodied in its minutes of December 8, 1947, constituted an acceptance of the offer of settlement of petitioner's claim. As the court below held, the Commission's determination was at most a qualified acceptance, since it was expressly made "subject to clearance by the General Counsel." It is well established that an acceptance of an offer "subject to" the approval of the offeree's attorney is not effective or operative unless and until such approval is obtained. 1 Corbin, *Contracts* (1950) § 61, p. 186; see, *e.g.*, *Lilly* v. *Haynes Co-operative Coal Mining Co.*, 50 N.D. 465, 196 N.W. 556, 559, and cases there cited.[3] In the present

[3] Petitioner attempts to controvert this settled rule of contract law by reference to the opinion of the district court in *Adams* v. *United States*, 101 F. Supp. 956 (D. Mass.), affirmed, 201 F. 2d 150

case, of course, the required approval never was obtained. On the contrary, the General Counsel subsequently disapproved petitioner's claim and his memorandum to this effect was the basis of the Commission's ultimate rejection of the proposed settlement (Finding of Fact 13, Pet. 22).[4]

Moreover, even if the Commission's vote to accept petitioner's offer had not been qualified, this determination obviously was effective only as an intra-agency authorization; it was never officially communicated to petitioner and could not have been operative as an acceptance. Such a vote by an official board or a corporation's board of directors has uniformly been held to be solely an internal determination with no operative

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(C.A. 1), holding "that the words 'subject to clearance by the Legal Division' [incorporated in a regulation authorizing the Director of the Division of Redelivery of Chartered Vessels to conclude settlements of shipowners' claims upon redelivery of vessels] impose no requirement of approval of that Division to make a settlement by the director binding upon the United States, but are only a directive to him to seek the assistance of the Division in the drafting and execution of formal agreements." 101 F. Supp. at 961. That language, of course, is plainly inapposite here; it deals only with the question of whether the Director had the *authority* to make settlements without the approval of the Legal Division. There is no question in the present case of the authority of the Commission to settle petitioner's claim; the only issue is whether in fact it unconditionally exercised that authority, or, as the court below held, it expressly conditioned its approval of petitioner's claim on clearance by the General Counsel.

[4] Even if, as petitioner contends, the requirement of legal clearance meant only that the agreement was subject to being put into formal legal terminology, no contract would arise until after this was done, and the terms and conditions of payment, including provision for a valid release, were determined upon, and incorporated into legal documents. For where the offeree makes clear that its acceptance is conditioned upon the execution of a written agreement, it is well settled that the formal document thus contemplated is the only binding expression of the agreement. 1 Corbin, *Contracts*, § 30, p. 80; *id.* at § 61, p. 186.

effect as an offer or an acceptance until it is officially communicated to the other party to the contemplated agreement. The vote does not become legally effective simply because the latter "learns of it in some fortuitous manner." 1 Corbin, *Contracts*, § 11, p. 23; *id.* at § 67, p. 211. See, *e.g.*, *Mayor of Jersey City* v. *Town of Harrison*, 72 N.J.L. 185, 62 A. 765; *Al's Lunch, Inc.* v. *City of Revere*, 324 Mass. 472, 87 N.E. 2d 5.[5] Petitioner, of course, was never formally advised that its offer of settlement had been accepted, nor was it even officially informed that the Commission had conditionally approved the offer.

Thus, it is plain that no new and enforceable promise to pay was created by the Commission's vote of December 8, 1957. As the Court of Claims concluded (Pet. 16), the most that petitioner can make of the Commission's action is a recognition of the amount of the Government's liability under the original maritime charter; and the court properly held that it was without jurisdiction over any claim based on that agreement. Accordingly, the petition was properly dismissed.[6]

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[5] The court in *Al's Lunch* quotes extensively and with approval from an earlier Massachusetts opinion, *Dunham* v. *Boston*, 12 Allen 375, in which the plaintiff sought specific performance of an alleged contract by the City of Boston to convey realty, claiming that his offer had been approved by the city council and the mayor, but that the city officials had failed to execute the deed. In holding that the council's vote, even when approved by the mayor, did not establish a contract with the plaintiff, the court pointed out that the vote "was not communicated to the plaintiff as a contract, and it does not appear that it was intended to be so. On the contrary, it was to be communicated to the proper officers of the city as an authority to them to execute a deed, and it contemplates the deed as the only contract which the city was to make with the plaintiff. It was thus a mere preliminary to the completion of the contract." 87 N.E. 2d at 6.

[6] As noted in the statement of the case, *supra*, p. 3, the Court of Claims recognized that it had no jurisdiction over peti-

CONCLUSION

For the foregoing reasons, it is respectfully recommended that the petition for a writ of certiorari should be denied.

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tioner's original claim for damages arising out of an alleged breach of the terms of the maritime charter, but nevertheless held in its opinion of October 5, 1954, denying the Government's motion for summary judgment, that it could consider a claim based upon the breach of an alleged agreement to settle this liability. The court's final decision to dismiss the petition, of course, renders it unnecessary to determine the validity of this jurisdictional holding; nevertheless we point out that the alleged settlement agreement, arising out of the provisions of the charter party, flowed directly from the maritime obligation, and, we submit, retained its maritime characteristics. Accordingly, contrary to the court's decision, it is our position that, even if petitioner had been able to establish a binding settlement agreement with the Maritime Commission, any claim under such an agreement would be within the exclusive jurisdiction of the district courts under Section 2 of the Suits in Admiralty Act, 46 U.S.C. § 742. *Matson Navigation Co.* v. *United States*, 284 U.S. 352; *United States* v. *Adams*, 201 F. 2d 150, 151 (C.A. 1).

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